No. 87-980

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MISSISSIPPI BAND OF CHOCTAW INDIANS,

APPELLANT,

v.

ORREY CURTISS HOLYFIELD, ET UX., J.B.,

NATURAL MOTHER, AND W.J., NATURAL FATHER,

APPELLEES.

ON APPEAL FROM THE SUPREME COURT OF

MISSISSIPPI

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE MENOMINEE INDIAN TRIBE OF WISCONSIN

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Appellees.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Menominee Tribe of Wisconsin respectfully moves this court for leave to file the accompanying brief in this case as amicus curiae. Oral consent to file was granted by counsel for the appellant by telephone on July 25, 1988. Counsel for appellee orally objected by telephone on July 25, 1988.

The Menominee Tribe of Wisconsin is a

federally recognized Indian tribe, exercising powers of self-government pursuant to the Menominee Restoration Act, P.L. 93-197, and having a reservation located in Wisconsin. It has an interest in this case in that in the course of delivering governmental services to tribal members and their children, it has observed opportunities and attempts to thwart tribal participation in decisions affecting the future of infant tribal members born off the reservation, despite the intent of the Indian Child Welfare Act.

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Brief of Menominee Indian Tribe of Wisconsin, Amicus Curiae.

STATEMENT OF INTEREST

The Menominee Tribe of Wisconsin is a federally recognized Indian Tribe having a reservation located in the State of Wisconsin. The tribe exercises governmental jurisdiction, including court jurisdiction over member children and and their families within the reservation in matters of child welfare, domestic relations, family services, delinquency, guardianship, and court-ordered protection and services. The tribal court regularly exercises jurisdiction in matters of child welfare based upon the domicile or residence of the subject child or the child's member parent. The Tribe considers tribal members who are either residents or domiciliaries of the reservation to be entitled to the protection and services of the tribal courts.

The Menominee Tribe operates a comprehensive social services program for tribal members living on or near the

reservation. Among those members have been women either pregnant or with infants whom they would prefer to place for adoption, but who for various reasons have been reluctant to seek assistance from the tribal social services department. They have therefore sought the assistance of county, state, or independent agencies in placing their children.

The Menominee Tribe has entered into an adoption services agreement with the State of Wisconsin. Pursuant to Wisconsin law, guardianship of a child for whom parental rights have been terminated by action of a county agency is transferred to the State in most cases pursuant to Wis. Stat. sec. 48.427(3)(a)(4). The agreement then assures that the State will work with the Menominee Tribe in planning and adoption services for the child.

The agreement, however, does not apply to post-termination guardianship that is

transferred to an independent child welfare agency pursuant to Wis. Stat., sec. 48.427(3)(a)(3). A strong potential exists, as in the instant case, that a mother who is a reservation domiciliary can deliver a child off the Menominee reservation, and immediately relinquish custody of the child to foster parents through an independent child welfare agency welfare agency. By asserting the position argued by appellees, the agency can boost the child out of tribal exclusive jurisdiction pursuant to section 1911(a) of the Act, and subsequently assert the voluntary proceedings provisions of the Act, section 1913, to circumvent the notice provisions of section 1912(a).

A decision in favor of the appellees in the instant case will encourage independent adoption agencies to once again look to the Indian reservations for children who may be available for non-Indian adoption. A decision in favor of the appellees in this case will

increase the probability of the Menominee Tribe not receiving due notice of proceedings for termination of parental rights or adoption through independent agencies, and will increase the numbers of tribal children cut off from the Menominee Tribe, their extended families, and their birthright.

ARGUMENT

For purposes of the Indian Child Welfare Act, residence and domicile of an Indian child should be defined by application of federal common law.

In the exercise of its plenary power over Indian tribes, Congress enacted the child Welfare Act of 1978, P.L. 95-608, in part codifying existing case law that recognized the overwhelming interest of a tribe in the domestic relations of its members who are reservation domiciliaries. Wisconsin Band of Potawatomies v. Houston, 393 F. Supp. 719 (D.W.D. Mich. 1973); Wakefield v. Little Light, 347 A.2d 228 (Md. App. 1975). Matter of Greybull, 543 P.2d. 1079 (Or. App. 1975); Matter of Adoption of Buehl, 555 P.2d 1334 (Wash. 1976). This pre-Act line of cases recognizes exclusive jurisdiction of a tribe to determine the care and custody of tribal

children only if it is established that a child is a reservation domiciliary.

The Act does not define the law by which domicile or residence of an Indian child are to be measured, although Bureau of Indian Affairs commentary to the published guidelines for state courts stated that "definitions (of domicile or residence) were not included (in the Guidelines) because these terms are well defined under existing state law. There is no indication that these state law definitions tend to undermine in any way the purposes of the Act." Guidelines for State Courts in Indian Child Custody Proceedings, 44 Fed. Register 67584, 67585 (November 26, 1979)

Under general canons of construction, unless there is plain indication of contrary intent, it is not to be assumed that Congress intends to make application of its statutes dependent on State law. N.L.R.B. v. Randolph Electric Membership Corp., 343 F.2d 60, 62-63 (4th Cir. 1965). This is to avoid impediments

to application of national legislation which might arise if state law were to control. Jerome v. United States, 318 U.S. 101 (1943). In cases involving determination of domicile of a minor for purposes of diversity, federal courts have used the federal common law, looking to the Restatement of the Law of Conflict of Laws, that a child retains the domicile last possessed by the parents, in accordance with Restatement of the Law of Conflict of Laws, sec. 14 ; sec. 22, comment c, d, e, h.

The four cases decided prior to enactment of the Indian Child Welfare Act and cited above, as well as cases decided in state courts since the Act have all analyzed the question of a child's domicile consistent with the provisions of the Restatement. Matter of Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. App. 1981), cert. den. 455 U.S. 1007 (1982); Matter of Adoption of a Baby Child, 700 P.2d 198 (N.M. App.

1985); In the matter of the Adoption of Jeremiah Halloway, 732 P.2d 962 (Utah Sup. Ct. 1986).

The Indian Child Welfare Act's purpose was to recognize and preserve the interest of Indian tribes in their children and to assure that Indian tribes remain a vital part of the tribal domestic relations equation. Unlike states and municipalities, Indian tribes must rely on birth and continuing affiliation to maintain their communities. Therefore, Congress created minimum federal safeguards to secure not so much the political interest of a tribe in its minor constituents, but the continuing viability of the tribal community.

Unification of the definitions under federal common law is consistent with the federal purpose in enacting the law. As recognized in Jeremiah Halloway, supra,

> (T)here certainly is nothing in the ICWA or its legislative history to suggest that state law controls if, in application, its subtleties bring it into conflict with the ICWA in ways that Congress apparently did not foresee.

Jeremiah Halloway, supra at 967.

Such analysis in Wisconsin courts would most likely follow these decisions and the Restatement, as the Wisconsin Supreme Court has already held that the domicile of a child is that of the child's parent for purposes of determination of eligibility for economic assistance. Town of Carlton v. Department of Public Welfare, 271 Wis. 465, 74 N.W.2d 340 (1956). In that case, the domicile of two incompetents was analyzed in accordance with the Restatement, which resulted in a holding that the two incompetents retained their deceased father's last domicile. That domicile continued even after establishment of a guardianship, until a successor guardian took recognizable and affirmative action that evinced an intent to change the wards' domicile.

A brief and loosely drawn discussion of the term "domicile" as it relates to the Act is also set forth at 70 Wis. Op. Atty. Gen. 237, 244 (1981), which combines a Restatement

analysis with a "significant contacts" analysis, without discussing the direction of the Town of Carlton case. This mixing of jurisdictional rules with forum non conveniens considerations demonstrates the potential for confusion in the absence of a clear adoption of a federal common law definition of domicile and residence.

SUMMARY OF ARGUMENT

The instant case does not present, as claimed by the Mississippi Supreme Court, the issue of whether domicile of a child is fixed in utero, but rather it begs application of previously recognized federal common law, consistent with the intent of the Act: that domicile is fixed, in default of other actions and intent, by the domiciliary status of the last custodial parent. Here there was apparently no provision for off-reservation guardianship or any other action that evinces intent to change the child's domicile - a

course of action that was likely open to the parents, the proposed adoptive parents, and their counsel. The power of the Holyfields to effect a change in the subect child's domicile is at best inchoate, as their authority does not ripen until the adoption is judicially approved. Without such affirmative acts by those vested with the authority to make choices on behalf of the child, the rule of law lays domicile within the tribal reservation. Accordingly, the petition for adoption was void for lack of jurisdiction, and the decision of the Mississippi Supreme Court should be reversed.

Dated this ____ day of July, 1988.

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ENTRY OF APPEARANCE

The Clerk will enter my appearance as Counsel for the Menominee Indian Tribe of Wisconsin, who in this court is

Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States.

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I am the person to be notified at the foregoing address.

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PROOF OF SERVICE

I, Kathryn L. Tierney, counsel of record for the Menominee Indian Tribe of Wisconsin, amicus curiae, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of July, 1988, I served copies of the foregoing Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief on counsel of record for the parties by depositing copies in a duly

addressed envelope, with first class postage prepaid, to:

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